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No. 81-469

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

WILLIAM C. BUSH,
Petitioner,
v.
WILLIAM R. LUCAS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF *AMICUS CURIAE* AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal employee whose constitutional rights have been violated by a federal official can recover damages against the official in federal court.

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PRELIMINARY STATEMENT

Pursuant to Supreme Court Rule 36, written consent of the parties having been obtained and filed along with this brief, the American Federation of Government Employees, AFL-CIO, files this brief as *amicus curiae* in support of the petition for a writ of certiorari filed by Petitioner, William C. Bush.

INTEREST OF THE *AMICUS CURIAE*

The American Federation of Government Employees, AFL-CIO (AFGE) is a labor union having approximately 300,000 members. AFGE represents approximately 700,000 civilian employees of the federal government. AFGE is the largest labor organization of non-postal federal employees, representing employees in nearly every major department and agency of the federal government. In its capacity as exclusive bargaining representative, AFGE negotiates personnel policies, presents grievances and complaints including court actions, and carries on legislative activity to improve the welfare of the employees it represents. AFGE has nearly 50,000 members who are employed in the states within the jurisdiction of the U.S. Court of Appeals for the Fifth Circuit.

The Fifth Circuit Court of Appeals has held in *Bush v. Lucas*, 647 F.2d 573 (5th Cir. 1981), that Petitioner Bush cannot recover damages from his supervisor (the Respondent in this action) for violating Bush's constitutional rights, due to the existence of an employer-employee relationship between Respondent and Petitioner. At all times material to this action, Petitioner was an aerospace engineer employed at the Marshall Space Flight Center, and Respondent was the Director of the Marshall Space Flight Center (Pet. 10). The Marshall Space Flight Center is a field facility of the National Aeronautics and Space Administration, an agency of the federal government. The Fifth Circuit's opinion denies thousands of AFGE members employed within the Fifth Circuit the right to recover damages for civil rights violations from federal officials.

Even more egregious is the fact that the Fifth Circuit's opinion can be read as denying federal employees

the right to recover damages for constitutional violations from any federal official, whether employed in the same or a different federal agency. Not being limited to instances when an employer-employee relationship may be found to exist between individuals employed within the same federal agency, the Fifth Circuit's opinion could be read as holding that a federal employee cannot recover damages for constitutional violations from any other federal employee, including law enforcement officials. An employer-employee relationship could be found whenever all of the persons involved in a civil rights violation work for the government of the United States, even when there is no regular employment relationship between the individuals.

AFGE has always been active in protecting the constitutional rights of federal employees and working to insure that federal employees are not denied constitutional rights and privileges enjoyed by other citizens. In this case, AFGE's concern is that civil rights be bolstered by remedies adequate to correct and deter civil rights violations. By taking away the most expedient remedy federal employees have to rectify violations of their constitutional rights, the Fifth Circuit has weakened the constitutional rights of all federal employees.

AFGE is committed to the protection of the constitutional rights of federal employees, and to obtaining redress for federal employees whose constitutional rights have been violated. This commitment is especially strong when the perpetrators of such violations are officials of the federal government. Additionally, AFGE upholds the principle that the right of public sector employees to be made whole for wrongs done to them is no less than that of any citizen who is employed in the private sector. Therefore, AFGE has a direct and compelling interest in the outcome of this litigation.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW RAISES SIGNIFICANT QUESTIONS CONCERNING THE RIGHT OF FEDERAL EMPLOYEES WHOSE CONSTITUTIONAL RIGHTS HAVE BEEN VIOLATED BY FEDERAL OFFICIALS, TO RECOVER DAMAGES AGAINST THE OFFICIALS IN FEDERAL COURT.

In 1971, this Court held that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court, despite the absence of any statute conferring such a right. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

This Court elucidated the two situations which would defeat a *Bivens* cause of action in particular cases in *Carlson v. Green*, 446 U.S. 14 (1980). As stated by this Court in Carlson:

> "The first is when defendants demonstrate "special factors counseling hesitation in the absence of affirmative action by Congress." Id., 403 U.S., at 396, 91 S.Ct., at 2004; *Davis v. Passman*, 442 U.S. 228, 245, 99 S.Ct. 2264, 2277, 60 L.Ed.2d 846 (1979). The second is when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective. *Bivens*, 403 U.S., at 397, 91 S.Ct., at 2005; *Davis v. Passman*, 442 U.S., at 245-247, 99 S.Ct., at 2277-2278."

446 U.S. at 18.

In *Bush v. Lucas*, 647 F.2d 573 (5th Cir. 1981), Petitioner sought a *Bivens* remedy against Respondent. Petitioner claimed that a demotion action was initiated against him by Respondent in retaliation for Petitioner's exercise of his First Amendment rights. (Pet. 13-14). The Fifth Circuit held that Petitioner does not have a *Bivens* remedy against Respondent, due to the applica-

bility to his case of the first *Bivens* exception set forth by this Court in *Carlson*. The Court held in *Bush*:

> ". . . the Government employer-employee relationship present in this case is a special factor which counsels hesitation in recognizing a constitutional cause of action in the absence of affirmative action by Congress . . . absent more explicit direction from Congress, a *Bivens* remedy should not be inferred."

467 F.2d at 577.

The Fifth Circuit reached this result by distinguishing between the role of the government as sovereign over private citizens, and its role as an employer. *Id.*, at 576. Such a distinction, in the context of individual constitutional rights and remedies, is inapposite. It erodes the civil rights of federal employees, giving them constitutional rights while denying them the remedy necessary to fully enforce those rights.

This Court has held in *Davis v. Passman*, 442 U.S. 228 (1979), that a Congressman may be liable to his employees under a *Bivens* cause of action. This Court held in *Carlson* that federal officials may be liable to federal prisoners under a Bivens cause of action. In terms of *Bivens* liability, the Fifth Circuit would subject executive branch officials to less liability than Congressmen. Federal prisoners would have a greater ability to recover *Bivens* damages than federal employees.

In finding the existence of an employer-employee relationship to be a special factor counseling hesitation in inferring a *Bivens* remedy, the Fifth Circuit expressed a fear that the availability of a *Bivens* remedy to federal employees:

> ". . . would tend to interfere with and undermine that traditional control of the Government over its internal and personnel affairs. It might encourage aggrieved employees to bypass the statutory and administrative remedies in order to seek direct judicial relief and thereby deprive the Government of

> the opportunity to work out its personnel problems within the framework it has so painstakingly established."

Bush, 647 F.2d at 577.

Initially it should be noted that the Fifth Circuit's concern ignores the principle that the federal government is not immune from federal law, no matter how expedient such immunity might be. This Court has stated in *Butz v. Economou*, 438 U.S. 478 (1978):

> "Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law:
>
> > 'No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government from the highest to the lowest, are creatures of the law, and are bound to obey it.' *United States v. Lee*, 106 U.S., at 220, 1 S.Ct., at 261."

Id., at 506.

The obligation to abide by the law implies a duty to defend againt allegations of illegal actions. In this regard, the inconvenience to federal officials of having to defend against *Bivens* actions, cannot be regarded as sufficient interference with the performance of their official duties to warrant the finding of a special factor counseling hesitation. The qualified immunity accorded to federal officials by *Butz*, provides adequate protection from undue interference. *Carlson*, 446 U.S. at 19.

The Fifth Circuit's concern that the availability of a *Bivens* remedy to federal employees would discourage their use of statutory and administrative remedies is unfounded. The statutory and administrative remedies available to a federal employee who has been demoted for exercising his constitutional rights would enable the employee to be reinstated, and to recover back pay. However, a *Bivens* remedy uniquely serves other important

purposes as well. In discussing the effectiveness of a *Bivens* remedy (as opposed to the statutory right to damages under the Federal Tort Claims Act (FTCA)) this Court stated in *Carlson*:

> ". . . the *Bivens* remedy, in addition to compensating victims, serves a deterrent purpose. See *Butz v. Economou*, 438 U.S. 478, 505, 98 S.Ct. 2894, 2910, 57 L.Ed.2d 895 (1978). Because the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy against the United States. It is almost axiomatic that the threat of damages has a deterrent effect, *Imbler v. Pachtman*, 424 U.S. 409, 442, 96 S.Ct. 984, 1000, 47 L.Ed. 2d 128 (1976) (WHITE, J., concurring in the judgment), surely particularly so when the individual official faces personal financial liability . . ."

466 U.S. at 21.

This Court also noted in *Carlson*:

> ". . . our decisions, although not expressly addressing and deciding the question, indicate that punitive damages may be awarded in a *Bivens* suit. Punitive damages are 'a particular remedial mechanism normally available in the federal courts,' *Bivens*, 403 U.S. at 397, 91 S.Ct. at 2005, and are especially appropriate to redress the violation by a government official of a citizen's constitutional rights . . ."

Id.

Additionally, under a *Bivens* cause of action a plaintiff has the right to a jury trial. *Id.*, at 22.

A *Bivens* cause of action clearly provides relief to federal employee victims of constitutional violations which is not provided by existing statutory or administrative remedies. These other remedies merely supplement the *Bivens* remedy, and by no means preclude it. Even a federal employee such as Petitioner, who has been successful in the use of his other avenues of relief,

needs the ability to recover damages under *Bivens* in order to be made whole for his injuries.[1]

The danger of the Fifth Circuit's denial of a *Bivens* remedy to federal employees lies not only in its preclusion of damages suits by subordinate employees against their supervisors. *Bush* could be interpreted to preclude *Bivens* actions by federal employees against any federal officials, e.g., a federal law enforcement agent conducting an illegal search and seizure.

The employer-employee relationship which existed between Petitioner and Respondent was that of an employee and the director of a federal activity, not the employee's immediate supervisor. The Fifth Circuit did not state the point, if any, within the federal government at which it would consider the employer-employee relationship too attenuated to justify precluding a *Bivens* cause of action. In its broadest sense, the employer-employee relationship referred to in *Bush* could be deemed to exist between any two employees of the Executive Branch, even if they have no employment related contacts with one another. The *Bush* decision leaves open the possibility that federal employees will be denied a damages remedy for any constitutional violation committed against them by any agent of the United States. That is not the result this Court intended when it determined that there may exist situations in which a *Bivens* cause of action against federal officials should be precluded.

Without being able to make use of all necessary remedies for the violation of their constitutional rights, the rights of federal employees are made inferior to those held by other citizens. As this Court has stated:

> "The very essence of civil liberty certainly consists in the right of every individual to claim the protec-

---

[1] Petitioner was reinstated by the Civil Service Commission's Appeals Review Board in July of 1978, and granted back pay, three years after his demotion. (Pet. 12).

> tion of the laws, whenever he receives an injury. *Marbury v. Madison*, 1 Cranch 137, 163, 2 L.Ed. 60 (1803)."

Bivens, 403 U.S. at 397.

There are present in this case no "special factors counseling hesitation" which would preclude Petitioner from maintaining a *Bivens* cause of action against Respondent. The Fifth Circuit misinterpreted *Bivens*, and *Carlson*, in holding that the existence of an employer-employee relationship between Petitioner and Respondent constituted such a special factor.

The issues presented by this case affect the ability of millions of federal employees to obtain adequate remedies for violations of their civil rights and to deter such violations. These issues will recur throughout the United States, as federal employees attempt to redress violations of their civil rights by federal officials through the use of damages suits filed pursuant to *Bivens*. A decision by this Court in the instant case would be determinative of the remedies available to federal employees, and the liability of federal officials, when such violations occur.

II. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS CONCERNING THE RIGHT OF FEDERAL EMPLOYEES WHOSE CONSTITUTIONAL RIGHTS HAVE BEEN VIOLATED BY FEDERAL OFFICIALS, TO RECOVER DAMAGES AGAINST THE OFFICIALS IN FEDERAL COURT.

The holding of the Fifth Circuit in *Bush* that a federal employee may not maintain a cause of action under *Bivens*, is squarely contrary to the decision of the U.S. Court of Appeals for the Seventh Circuit in *Sonntag v. Dooley*, 650 F.2d 904 (7th Cir. 1981). It is also contrary to the opinion of the U.S. Court of Appeals for the District of Columbia Circuit in *Halperin v. Kissinger*, 606 F.2d 1192 (D.C. Cir. 1979), *aff'd. per curiam*, 49 U.S.L.W. 4782 (1981).

In *Sonntag*, plaintiff was a civilian employee of the U.S. Army working at Fort Sheridan, Illinois. She sued the Director of Plans, Training and Security at Fort Sheridan. The action was based upon violations of plaintiff's Fifth Amendment rights in relation to her being coerced into retiring from the federal service. Plaintiff sought monetary damages from defendant.

In reversing the district court's dismissal of plaintiff's action, and holding that a *Bivens* action could be maintained by a federal employee against a federal official, the Seventh Circuit stated:

> ". . . defendants have not demonstrated 'special factors counseling hesitation' under *Carlson* because they do not enjoy 'such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate' and because 'even if requiring them to defend [plaintiff's] suit might inhibit their efforts to perform their official duties,' their qualified immunity provides adequate protection for them. *Carlson v. Green, supra*, at 19, 100 S.Ct. at 1472."

Sonntag, 650 F.2d at 907.

The holding of the Seventh Circuit in *Sonntag* that a federal employee may bring a *Bivens* action against a federal official cannot be reconciled with the holding of the Fifth Circuit in *Bush*.[2]

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[2] The Seventh Circuit stated that as the plaintiff in *Sonntag* had no alternative remedies available, she could maintain a *Bivens* action even "assuming" that the district court was correct in concluding that a *Bivens* remedy cannot be used when alternative remedies are available. This assumption by the Seventh Circuit does not alleviate the conflict between *Bush* and *Sonntag*. The Seventh Circuit did not hold as a matter of law that the existence of alternative remedies would preclude a *Bivens* cause of action. Nor did the Seventh Circuit hold that the existence of alternative remedies would activate the *Bivens* exception upon which the Fifth

In *Halperin*, a former employee of the National Security Council and his family brought suit against ten federal officials for money damages. It was alleged that the officials had violated plaintiffs' Fourth Amendment rights by placing a wiretap on plaintiffs' home telephone. The D.C. Circuit cited *Bivens* for the principle that the ordinary remedy for an invasion of personal interests in liberty is damages. 606 F.2d at 1207. The D.C. Circuit then stated:

> "The instant suit is squarely within this tradition, and the Halperins are 'entitled to recover money damages for any injuries [they have] suffered as a result of the . . . violation of the [Fourth] Amendment . . .'"

Id., (footnotes omitted).

In *Halperin*, a federal employee was allowed to maintain a *Bivens* action against both his supervisor, the National Security Advisor, and the President of the United States. The Fifth Circuit's decision in *Bush* would preclude such suits, and is therefore in conflict with *Halperin*.

These conflicts justify the grant of certiorari to review the judgment below.

Circuit relied, the existence of "special factors counseling hesitation."

AFGE asserts that there is no remedy currently available to federal employees which is a substitute for, or alternative to, a *Bivens* action. This is due to the fact that a *Bivens* remedy is so much more effective than any other remedy available to federal employees whose civil rights have been violated. See page 7, *supra*; *Carlson*, 446 U.S. at 21.

The "alternative remedies" argument being moot, there are no circumstances under which *Bush* and *Sonntag* could be in accord with one another.

CONCLUSION

For the aforesaid reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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